BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELADIO CHAVEZ	)	
Claimant	)	
VS.	)	
	)	
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	Docket Nos. 1,003,353
	)	1,004,620
AND	)	
	)	
CGU HAWKEYE SECURITY and	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and CGU Hawkeye Security Insurance Company (Hawkeye) appealed the May 22, 2003 Order for Medical Treatment entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

Judge Fuller ordered that medical treatment for claimant's left and right knee injuries be paid by respondent and Hawkeye. Respondent and Hawkeye contend claimant failed to prove he suffered personal injury by accident arising out of and in the course of his employment. Respondent and Hawkeye further contend that the ALJ exceeded her authority in finding Hawkeye responsible for claimant's medical treatment and "in issuing an Order for Medical Treatment without making specific findings of fact and conclusions of law which are reasonably necessary to determine that the claimant met with a compensable injury." [1] Respondent and Hawkeye also raise issues concerning date of accident, notice and written claim. Respondent and Hawkeye contend that if claimant did

[1] Application for Review by the Workers Compensation Appeals Board (filed June 2, 2003).

suffer a compensable injury it was not while Hawkeye was respondent's workers compensation insurance carrier.

Claimant argues Judge Fuller's preliminary hearing order is not appealable, but that if the Board does have jurisdiction to review the Order for Medical Treatment it should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On an appeal from a preliminary hearing order, the Board's review is limited to allegations that the ALJ exceeded his or her jurisdiction. [2] This includes review of the issues identified in K.S.A. 44-534a as jurisdictional issues. In this case, respondent and Hawkeye dispute that claimant's current need for medical treatment is the result of an injury or injuries that arose out of and in the course of his employment with respondent. Although it is apparent that Hawkeye is primarily concerned with determining the date or dates of accident in order to establish which insurance carrier is liable for benefits, Hawkeye also raises issues concerning timely notice and written claim. As such, a determination of the accident date becomes necessary to decide the disputed issues of whether claimant suffered an accidental injury, whether the injury arose out of and in course of claimant's employment, whether notice was timely given and whether written claim was timely made. These issues are deemed jurisdictional on an appeal from a preliminary hearing order. [3]

Claimant injured his knees by a series of accidents that arose out of and in the course of his employment with the respondent.

In Docket No. 1,003,353 claimant alleges repetitive trauma injuries to both lower extremities by "a series of injuries beginning on or about June 10, 2001 and continuing every day thereafter[.]" [4]

In Docket No. 1,004,620 claimant alleges he injured his "left lower extremity with other areas to be determined" when he "[s]lipped and fell at work" on June 6, 2002. [5]

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[2] K.S.A. 44-551.

[3] K.S.A. 44-534(a)(2).

[4] K-WC E-1 Application for Hearing (filed April 12, 2002).

[5] K-WC E-1 Application for Hearing (filed June 21, 2002).

Hawkeye was respondent's workers compensation insurance carrier for a period ending August 31, 2001. Thereafter, respondent's insurance coverage was with Liberty Mutual Insurance Company (Liberty) until October 31, 2002.

Claimant also has claims against respondent, in Docket Nos. 255,486 (low back) and 255,487 (knees), but those claims were not a part of the ALJ's preliminary hearing order and, therefore, are not included in this appeal. [6]

> Mr. Herdoiza: Judge, our position is that this gentleman originally suffered injuries to his knees in Docket No. 255,487, which is still on a running award; and that's the case with Shane Bangerter who is not present at this time. [7]

An Award was originally entered in Docket No. 255,487 on September 17, 2001, which utilized an accident date of March 12, 2000. After his March 12, 2000 accident, claimant's job duties involved "walking the floors and cleaning up all eight hours." [8] Claimant worked six days a week. He cleaned floors, picked up trash and did other cleaning activities. Claimant continued to work for respondent until June 10, 2002. He testified that performing these job duties caused a worsening of his bilateral knee condition.

> A. (Mr. Chavez) I would wash and pick up the trash and - - and every day that I would do this, I would - - I would feel like I was getting hurt even more.[9]

Claimant also testified about two specific accidents where he fell. These occurred on June 10, 2001 and June 6, 2002. On both occasions he reported the accident to respondent. Claimant contends that he further aggravated his knee injuries by his regular work activities before and after his slip and fall accidents.

> Q. (Mr. Herdoiza) But, Mr. Chavez, aside from these falls, did you continue to aggravate your knees each and every day you worked at National Beef?
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> A. (Mr. Chavez) Yes, every day that would go by it would affect me more.

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[6] It is noted that claimant's March 17, 2003 letter to the Director enclosing Applications for Preliminary Hearing and the Notice of Intent letter referenced all three docketed claims.

[7] P.H. Trans. (May 15, 2003) at 7-8.

[8] P.H. Trans.(May 15, 2003) at 15.

[9] P.H. Trans. (May 15, 2003) at 16.

I would tell the nurses, but they told me that there was - - there wasn't anything that they could do.

Q. How often did you go see the nurses regarding the problem with your knees?

A. Several times. A lot of times. I would go - - I would go every three days or I would go there every week and I would tell them that if they could change me from my work because I was - - I was hurting my knees more every day.

Q. Did you ask them if they could change your job?

A. Yes.

Q. Did they change - -

A. No, they told me that they couldn't do anything, that those were doctor's restrictions.

Q. Did they ever send you for any additional medical treatment for your knees?

A. Before they would send me, like in the year 2000, but after the surgery, no. But after the year 2000, they didn't send me anywhere.

Q. Now, are you sure that the work that you continued doing in the plant was making your knees worse?

A. Yes.

Q. Any doubt in your mind about that?

A. No, no doubt.

Q. When you stopped working about a year ago, did the problems with your knees get better, get worse or stay the same?

> A. Well, the only reasons that they got better was because I quit working, so I was actually feeling better. [10]

Claimant was seen at the request of his attorney by orthopedic surgeon Edward J. Prostic, M.D., on October 11, 2000, and September 25, 2002. In his October 11, 2000 report, Dr. Prostic relates being given a history of claimant suffering two accidents during his employment with the respondent. The first occurred on or about March 12, 2000, when claimant "lost his footing on fat and did the splits." Right knee surgery was performed by Dr. Garcia on May 24, 2000, for debridement of a tear of the medial meniscus. On July 12, 2000, claimant underwent surgery on the left knee for a partial medial and a partial lateral meniscectomy. Claimant was released to return to light duty on September 26, 2000. The second injury reported to Dr. Prostic was to claimant's low back on or about April 5, 2000.

At the time of his initial examination by Dr. Prostic, claimant complained of continued difficulty with both knees, the left more than the right. Claimant reported increased pain after standing or walking for ten minutes. He also had difficulty ascending and descending stairs and difficulty with squatting or kneeling. Claimant said he was unable to run or jump. He described clicking and popping and giving way of the left knee. On examination the right knee had no obvious tenderness. Dr. Prostic described the range of motion and stability of the right knee as satisfactory. As for the left lower extremity, Dr. Prostic reported:

> Left lower extremity: The alignment is that of mild genu varum. There are scars about the knee from arthroscopic punctures. There is one inch decrease in circumference of the left thigh as compared to the right and there is the feel of synovial hypertrophy and effusion about the left knee. Range of motion and stability are satisfactory but with significant crepitus. Meniscal signs are negative.
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> X-RAYS: Right & left knees: Multiple projections are taken. There are osteophytes medially bilaterally. Medial joint space is 2 mm. of the right and less than 1 mm. at the left knee. There is genu varum deformity bilaterally, worse on the left.

Dr. Prostic concluded that:

> On or about March 12, 2000, Eladio Chavez sustained injuries to his knees during the course of his employment. He has been found to have

[10] P.H. Trans. (May 15, 2003) at 17-19.

> degenerative change at both knees with tearing of the medial meniscus of the right knee and tearing of both menisci of the left knee. He has had limited improvement from surgery. He will require total knee replacement on the left in the not very distant future. At the right, he may be treated with high tibial osteotomy or wait for the requirement for total knee replacement. He should continue with anti-inflammatory medicines by mouth until his surgery is completed. For his knees, he is unable to do prolonged standing or more than short distance walking. He is unable to do more than minimal stair-climbing, squatting, kneeling, or carrying. [11]

Claimant returned to Dr. Prostic on September 25, 2002. Dr. Prostic reported receiving a history that "since his [previous] examination by me, he has had one new accident. June 6, 2002 he fell and did the splits with aggravation of the left knee. He reported his injury and was terminated soon thereafter. The patient has been unemployed since termination from National Beef. " [12] Dr. Prostic reviewed claimant's medical records including a February 25, 2002 MRI study of the right knee which reportedly showed "'complete destruction of the medial meniscus with severe secondary degenerative changes medially. . . fluid in the joint space and a Bakers' cyst.'" MRI of the left knee performed the same day showed "'high-grade tear of the anterior cruciate ligament that could easily be a complete tear. . . very severe degenerative changes of the medical compartment as described with complete destruction of the medial meniscus and severe osteoarthritis medially. . . some fluid in the joint space.'" [13]

Dr. Prostic again took x-rays of both knees that showed:

> There is genu varum bilaterally, left greater than right. There is complete loss of medial joint space of the left knee and only 1 to 2 mm. of joint space remaining of the medial compartment of the right knee. There is lateral facet overhang of the patella bilaterally with minimal joint space between the lateral most portion of the left patella and the lateral femoral condyle. [14]

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[11] P.H. Trans. (May 15, 2003) Resp. Ex. 1 at 3.

[12] P.H. Trans. (May 15, 2003) Cl. Ex. 1 at 1.

[13] P.H. Trans. (May 15, 2003) Cl. Ex. 1 at 1.

[14] P.H. Trans. (May 15, 2003) Cl. Ex. 1 at 2.

Dr. Prostic attributed claimant's injuries to repetitive trauma "during the course of his employment with National Beef." [15] At that time Dr. Prostic believed claimant needed a total knee replacement on the left and that claimant would soon need a total knee replacement on the right.

Bilateral total knee arthroplasties were also recommended by Dr. Guillermo Garcia on February 20, 2003. Thereafter, Dr. Garcia proceeded with the total knee replacement surgery on the left side. At the time of the May 15, 2003 preliminary hearing, claimant had not yet had the recommended total knee replacement surgery on the right side.

On September 26, 2002, Judge Fuller issued an Order Nunc Pro Tunc for an independent medical examination to be performed by Dr. Terrence Pratt. That examination was performed on October 7, 2002. At that time claimant described ongoing bilateral knee problems but with worse symptoms on the left side. Although previous medical treatment was mentioned, the only specific event reported to Dr. Pratt at this examination was the slip and fall of June 6, 2002. Dr. Pratt does note under "past" medical history, that claimant "required operative intervention for involvement of his knees bilaterally in 2000. This was well outlined in the prior report, reporting the onset of symptoms in February or March 2000 related to vocationally related activities when his right foot slid." [16]

Dr. Pratt noted that the Judge's Order asked that he specifically address causation and he did so as follows:

> The event, which he describes today, was specific for the left knee and any event with twisting of the knee could result in an increase in symptoms. It is my opinion that the event resulted in aggravation of his underlying symptoms with aggravation of his significant underlying involvement. In terms of treatment for the left knee, his need for treatment is not in relationship to the aggravation which occurred. The aggravating event was not felt to be a significant factor in the involvement of the left knee, but his prior involvement with significant degenerative changes and significant changes on MRI assessment are the primary cause for additional treatment needs. He needs evaluation to consider definitive treatment for the left knee involvement, which has been longstanding. Dr. Perez noted involvement to a degree which lead to [a] MRI assessment with abnormalities being identified before

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[15] P.H. Trans. (May 15, 2003) Cl. Ex. 1 at 2.

[16] Terrence Pratt, M.D., Oct. 7, 2002 IME Report at 2. (His prior report, dated March 30, 2001, is respondent's Ex. 3 to the transcript of Aug. 8, 2002 preliminary hearing.)

> the June 2002 reported event. I do believe that there has been some permanent aggravation of the underlying involvement in relationship to the event, but please note that he had significant preexisting problems with the extremity, and as outlined above his need for treatment primarily relates to the preexisting involvement. He does have some additional functional impairment in relationship to the additional event. He was assessed in the past for permanency for the left knee involvement, but at this time with the aggravating event, he has an additional five percent (5%) impairment of the left lower extremity with consideration of the 4th Edition of the AMA, Guides to the Evaluation of Permanent impairment with aggravation of significant underlying involvement.
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> His degree of involvement bilaterally were severe enough to consider additional procedures in the past. There was even a prior report by Dr. Prostic noting possibly a need in the future for procedures for the knees in 2000. With the significant changes on the MRI assessment from February 2002 that would certainly be a consideration, but again this occurred prior to the reported event in June 2002. [17]

The deposition of one of claimant's treating physicians, Armando Perez, M.D., was taken on May 13, 2003. Dr. Perez practices family medicine in Dodge City, Kansas. He is claimant's personal physician and is not the authorized treating physician for claimant's work injuries. It was Dr. Perez that ordered the MRI studies of claimant's knees in February of 2002. Dr. Perez offered to refer claimant to an orthopedic specialist, but claimant declined because it was a work-related injury. Dr. Perez described the condition in both claimant's knees as a chronic condition which did not change much during the time he saw claimant.

> Q. (Mr. Malone) Doctor, did [sic] your examinations and evaluations of Mr. Perez in the time that you treated him for his knee complaints beginning in January 2002 and continuing through August 2002, did you see anything that would indicate to you that the nature of those injuries as described by Doctor Prostic had changed in any fashion?
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> A. (Dr. Perez) No, no. I mean with the information of Doctor Prostic, as early as October of 2000, I don't think it has been a drastic change. They were just blown out at that time and they are just blown out. [18]

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[17] Terrence Pratt, M.D., Oct. 7, 2002 IME Report at 6-7.

[18] Perez Depo. at 13.

In addition, although claimant attributed his condition to work, he did not relate a specific accident or traumatic event.

> Q. (Mr. Herdoiza) He didn't indicate that there was an aggravating injury or an initial accident or slips or falls or anything like that in the plant where he was working?
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> A. (Dr. Perez) At no time since I saw him in January 2002 up until August, he never mentioned a new injury or a new fall. [19]

Dr. Perez also opined that claimant's work aggravated his bilateral knee condition.

> Q. (Mr. Herdoiza) Okay. If he continued to work for the most part during that time period at National Beef, and considering that he had already indicated problems to both knees as far back as the year 2000 through Dr. Prostic's report, would it have been the continued work that he did at the plant that would have caused the continuing aggravation to his knees, or would that just have been something that would have occurred regardless?
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> A. (Dr. Perez) Well, the knee is the main joint that supports the weight of the body. A knee that was injured so badly, according to my evidence, back in 2000, of course, that person walking or standing, I mean he has to walk, he - - there's - - there would be more deterioration to those knees with the time, being at work with those knees the way they were blown out will - - if your question is, would keeping him working have worsened the arthritis of his knees, the answer is yes. [20]

However, Dr. Perez also testified that claimant's condition would be a natural and probable consequence of his original injury and that the normal activities of daily living contributed to the deterioration of his knees.

> Q. (Mr. Malone) So just whether he was talking at home or standing at home, that would have the same effect - -
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> A. (Dr. Perez) Right.
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> Q. - - as if he were standing at work, correct?

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[19] Perez Depo. at 15.

[20] Perez Depo. at 16-17.

A. Right. [21]

Essentially, Dr. Perez agreed with everything each attorney said. As a result, his opinion changed depending on which attorney was asking the question. Nevertheless, Dr. Perez ultimately explained that if claimant spent a greater portion of his day standing at work than at home, claimant's work would have aggravated his bilateral knee condition to a greater degree than would his more sedentary activities away from work. [22]

Following the creation of the bright line rule in the 1994 *Berry* [23] decision, our appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster* [24] the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. As such, *Treaster* focuses upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury should be the last date that the worker performed his or her usual work duties, whether the worker stops because the employment causes or, instead, is moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position. [25]
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> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel

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[21] Perez Depo. at 20.

[22] Perez Depo at 21.

[23] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[24] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[25] *Id.* at Syl. ¶ 3.

syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks. [26]

In *Treaster,* the Kansas Supreme Court also approved the principles set forth in *Berry,* in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

In this case, claimant last worked for respondent on or about June 10, 2002. And it appears that claimant left work due to his injuries. Accordingly, June 10, 2002, will be utilized as the accident date for claimant's series of accidents in these two docketed claims. There is no question but that respondent was given repeated notice of claimant's ongoing work-related aggravations. Furthermore, based upon a June 10, 2002 accident date, claimant's Application for Hearing filed April 12, 2002 in Docket No. 1,003,353 and June 21, 2002 in Docket No. 1,004,620 were timely. [27] Therefore, the preliminary hearing benefits, including medical treatment, after June 10, 2002, are the responsibility of respondent and the workers compensation insurance carrier providing respondent's coverage on that date.

WHEREFORE, the Appeals Board modifies the Order for Medical Treatment entered by Administrative Law Judge Pamela J. Fuller on May 22, 2003 to find an accident date of June 10, 2002.

IT IS SO ORDERED.

Dated this _____day of August 2003.

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BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Terry J. Malone, Attorney for Respondent and Liberty Mutual Ins. Co.
Kendall R. Cunningham, Attorney for Resp. and CGU Hawkeye Security Ins. Co.
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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[26] *Id.* at Syl. ¶ 4.

[27] K.S.A. 44-520; K.S.A. 44-520a.